IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 2906 OF 2006.

1) Smt.Shailaja Mahadeo Wadke
(since deceased through LRs.)

a) Mahadeo Baburao Vadke,
(Deceased).

b) Madhuri Pradip Langekar,
Age: 50, Occ.: Service,
R/at Kothrud, Pune.

c) Mr.Dilip Mahadeo Wadke,
45 yrs., Occ.: Service.

d) Nilima suresh Dandekar,
Age: 48, Occ.: Service.

e) Mr.SunilMahadeo Wadke,
Age: 44, Occ.: Business.

f) Vijaya Dilip Thambade,
Age: 42, Occ.: Housewife.

g) Hemant Mahadeo Wadke,
Age: 40, Occ.: Business,
All R/at 1392, Kasba Peth,
Pune-11.

2) Mr.Hemant Mahadeo Wadke,
Age: 28, Occ.: Business,
R/at 1392, Kasba Peth,
Pune-11. ... Appellants.
(Org.Plaintiffs.)

Versus.

1. Smt.Sumatibai Vishnupanth
Parange, Age: 79, Occ.:
Housewife, R/at 746, Kasba
Peth, Pune-11.

2. Saraswatibai G. Borlikar,
Age: 81, Occ.: Housewife,
R/at Flat No.26, Sharada Soceity,
Churgate, Mumbai.

3. Kesarnitah G.Morlikar,
(Since deceased)
a) Smt.Viniodini K.Borlikar,

65 Yrs., Occ.: Housewife.

b) Raja Kesarinath Borlikar,
Age: 35, Occ.: Business.

c) Mahesh Kesarinath Borlikar,
Age: 40, Occ.: Business.

d) Rekha Arte,
Age: 30, Occ.: Housewife.

All R/at Sharada Society,
Churchgate, A Road,
Mumbai-20.

(Respondent No.3 and his legal heirs deleted as per order dated 5.1.2004.)

4. Subhadra Prabhakar Waknies,
Age: 58, occ.: Housewife.
R/at Annapurna Nivas,
Thakurdwar, Mumbai-4.

5. Hirabai Madhusudan Panwelkar,
Age: 63, Occ.: Housewife,
R/at Silver Mast Coop.Society,
1st floor, Santacruz, Mumbai-74.

6. Lilabai Madhukar Hazare,
Age: 58,. Occ.: Housewife,
R/at 5/G, Keshav Niwas,
2nd Subhas Lane, Girgaon,
Mumbai-1.

7. Mrunalini Manohar Hazare,
Age: 48, occ.: Housewife,
R/at Kasar Ali, Kalyan.

8. Smt.Kamal Nandkumar Parange,
Age: 43, Occ.: Housewife,
R/at Madhuban Society,
Ram Maruti Road, Thane.

9. Surendranath G.Borlikar,
Age: 50, Occ.: Business,
R/at Flat No.26, Sharda Society,
Churchgage, Mumbai-20.

10. Smt.Mandakini Anant Lombar,
age: 46, Occ.: Housewife,
R/at Flat No.C-4, Geeta
Hsg.Society, Pune-1. ... Respondents

(Org.Defendants.)

Shri N.V.Walawalkar, Senior Counsel i/by Shri S.N.Chandrachud for the Appellants.

Shri A.V.Anturkar with Shri S.B.Deshmukh for the Respondent No.1.

CORAM : ABHAY S.OKA, J.

DATED : 16th March, 2007.

ORAL JUDGMENT.:

1. Submissions of the learned Counsel appearing for the parties were heard on 31st January 2007 and the judgment was reserved. The question which arises for determination in this First Appeal is as regards the forum of this Appeal.

2. It will be necessary to briefly refer to the facts of the case for the purpose of appreciating the submissions made by the learned Counsel appearing for the parties. In a suit filed by the Appellants, the Appellate Court passed a decree for partition and separate possession. The decree was to the effect that the Appellants/Plaintiffs are having 9/10th share in the suit property. By the decree a direction was issued for appointment of the Commissioner for effecting partition by metes and bounds. A direction was also issued for the appointment of recognised valuer in execution

proceedings for the purpose of valuation of the property. The decree passed by the Appellate Court was confirmed by this Court and a Special Leave Petition filed in the Apex Court has been dismissed.

3. By the Judgment and Order dated 26th September 2006, the learned Joint Civil Judge, Senior Division, Pune held that the value of the share in question was Rs.6,75,536/-. The Appellants/Plaintiffs were directed to sell their share to the 1st Defendant on her paying the price of the property as per the said valuation to the Appellants.

4. When the Appeal came up for admission before this Court, a question arose whether the forum of Appeal will have to be decided on the basis of the valuation made for jurisdiction of the original suit in which decree for partition was passed or on the basis of the valuation made of the share of the Plaintiffs. It is not in dispute that if forum of appeal is determined on the basis of the valuation made for jurisdiction of the original suit in which the decree for partition is passed, the forum of appeal will be the appropriate District Court as the valuation of the suit for jurisdiction is less than Rs.2 lakhs.

5. The submission made by the learned Senior

Counsel appearing for the Appellants was that the order impugned has not been passed in a proceeding which can be treated as a continuation of the proceedings of the suit. He invited my attention to the provisions of the Partition Act, 1893 and pointed out that the impugned order has been passed under the provisions of section 4 of the said Act of 1893. He pointed out that in fact under section 8 of the said Act of 1893, any order for sale made by the Court under sections 2, 3 or 4 shall be deemed to be a decree within the meaning of section 2(2) of the Code of Civil Procedure, 1908. He submitted that by a legal fiction created by section 8, the order passed under sections 2, 3 and 4 has been treated as a decree and that is the reason why the present Appeal is maintainable as a First Appeal. He submitted that the value of the subject matter of the proceedings under the said Act of 1893 where an order for sale has been made, is the market value of the property which is ordered to be sold. He submitted that in the present case the valuation of the market value made is of more than Rs.2 lakhs and therefore, in view of section 26 of the Bombay Civil Courts Act, 1869, the forum of appeal will be this Court as the valuation exceeds the sum of Rs.2 lakhs. The learned Counsel for the 1st Respondent has placed reliance on various decisions and submitted that the Appeal will lie to the District Court. I will refer to the various decisions which are relevant for

consideration in the later part of this judgment.

6. It will be necessary to refer to the decree passed for partition. By the said decree, it was declared that the Appellants/Plaintiffs were having 9/10th share in the suit property. The decree itself directs an appointment of an expert valuer for the purpose of valuation of the property. The decree provides that the Commissioner shall be appointed in execution for division and separation of the share of the Plaintiffs by metes and bounds. A separate direction is given for holding an enquiry for determination of mesne profit under Order XX Rule 12 of the Code of Civil Procedure, 1908.

7. On the basis of the decree for partition which was confirmed upto the Apex Court, a final decree proceedings was filed by the Appellants. The 1st Respondent filed an application invoking section 4 of the said Act of 1893 in the said proceedings. Section 4 of the said Act of 1893 reads thus:

> "4. **Partition suit by transferee of share in dwelling house.-** (1) Where a share of a dwelling-house belong to an undivided family has been transferred to a person who is not a member of such family and such transferee sues

> for partition, the Court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder, and may give all necessary and proper directions in that behalf.
>
> . (2) If in any case described in sub-section (1) two or more members of the family being such shareholders severally undertake to buy such share, the Court shall follow the procedure prescribed by sub-section (2) of the last foregoing section."

The said application was allowed by order dated 20th December 2005. A valuation report was filed on record. Thereafter, there was an order of remand passed by this Court. After the order of remand, the parties led evidence as regards valuation of the suit property. As pointed out earlier, the share of the Plaintiffs was valued at Rs.6,75,536/- and the Plaintiffs were directed to sell the said share to the 1st Defendant on the payment of price.

8. The shares of the parties were determined in the

decree for partition in a suit filed by the Appellants/Plaintiffs. The occasion for filing an application under section 4 of the said Act of 1893 arose as there was a decree for partition. The decree was sought to be given effect by filing the final decree proceedings. Section 4 provides that even during the pendency of a suit for partition filed by a transferee of a share in a dwelling house, who is not a member of the family, any member of the family can offer to buy the share of such transferee. After such offer is made, the Court is required to follow the procedure which is prescribed by the said Act of 1893 and more particularly mentioned in sub-section (2) of section 3 of the said Act of 1893. In the present case, the option under section 4 is invoked during the pendency of the final decree proceedings. Thus it is obvious that a claim under section 4 of buying the share of the transferee can arise only in a suit for partition.

9. A reference will have to be made to the decision of the Full Bench of this Court in the case of Kazi Syed Saifuddin v/s. Kasturchand Abhayrajji Golchha (1999(2) Mah.L.J.page 675). In a suit filed by the landlord for eviction of a tenant and for arrears of rent as well as mesne profits, a decree was passed and a direction was given to hold an enquiry for determination of mesne profits as required by Order XX Rule 12 of the Code of

Civil Procedure, 1908. The question arose whether the forum of appeal for challenging the decree passed consequent on enquiry made as regards mesne profits will be determined on the basis of the valuation for jurisdiction made by the Plaintiff in the original suit or on the basis of the determination of the quantum of mesne profits amount determined in the enquiry. In paragraph 16 of the said decision, the Full Bench observed as under:

> "16. **Once the suit is thus valued and the jurisdiction of the Court is thus determined at the stage when the suit is instituted, that will be the valuation for the subsequent proceedings in the suit also.** Obviously, therefore, the appeal being continuation of the suit, the valuation will govern appeal as well and for the purposes of forum of appeal that will be the provision to govern the situation. Section 26 of the Bombay Civil Courts Act, 1869 as well as the submission made on behalf of the party who has taken the preliminary objection will now be considered." (Emphasis added).

Another submission was made before the Full Bench that an enquiry under Order XX Rule 12 of the said Code is an

independent enquiry under the specific provision of the said Code and therefore, by no stretch of imagination it can be stated to be a continuation of the suit. The Full Bench dealt with the said submission by referring to different hypothetical cases. In paragraph 21 the Full Bench observed thus:

> "21. The argument of the learned counsel for the appellant, if accepted, is likely to give rise to certain anomalous position. In a suit for accounts filed by a sleeping partner he may not be aware at all of the nature of profits and his possible share. Even if aware, the law permits him to notionally value the claim in the plaint. If such a suit is dismissed, then against the decree on the basis of notional valuation in the plaint, the appeal by defendant would definitely go to the District Court. If the District Court reserves the decree of dismissal and pass a decree for a sum which is more than the limits of pecuniary jurisdiction of the trial Court (Civil Judge, Jr.Dn.) then it may be contended even at the appellate stage that the trial court had no jurisdiction to entertain the suit. Thus after coming to the conclusion regarding the quantum to be awarded finally to

the plaintiff, the Appellate Court will have to return the plaint for presentation to the proper Court. Similar is the case of claim in respect of future mesne profits. Future mesne profits are by their very nature profits or the income derived by the defendant during the pendency of the suit. The cause of action for the same does not accrue when the plaint is presented and in order to enable the plaintiff, a proviso is introduced to make a request to the Court for direction regarding the inquiry into future mesne profits, the quantum of which is not known to anybody at that stage. If after inquiry into future mense profits the Court comes to a conclusion that the quantum to be awarded is beyond the pecuniary limits of the jurisdiction then it may be contended successfully that the Court had no jurisdiction to pass the preliminary decree as one of the claims made in the plaint was beyond the pecuniary jurisdiction of that Court. However, in the same case, an appeal against the dismissal of the suit would nevertheless lie to the District Court. Similarly, in a suit for accounts, the law permits the Plaintiff to make notional valuation and, as already discussed, the

valuation for the purpose of jurisdiction is the same which is the valuation for the purpose of Court Fees as is permitted by law. **If the contention that the forum of appeal is dependent on the final adjudication of the matter regarding the quantum of accounts or on the final decree then the preliminary decree may be challenged as one without jurisdiction and nonest. In fact, in order to avoid such eventualities, provision has been made permitting the plaintiff to have a notional valuation and to pay the fixed Court fees and the valuation for the purposes of jurisdiction is also to be the same.** It is for these simple reasons, in the decision in Ambadas vs. Vishnu Govind, AIR 1927 Bom.83, the Division Bench of this Court has held that the mere fact that the decree is for an amount exceeding the pecuniary jurisdiction of the Court which passed the decree, is not ipso facto proof that it was beyond jurisdiction and a nullity and the Court is wrong in questioning in execution the validity of such a decree. The judgment is followed in the case of Bindraban Kanhaiyalal Agarwal vs. Kasturilal Nyahalchand Soni and others, 1978 Mah.L.J.561 by emphasising that it is the

> value of the claim in the plaint which determines pecuniary jurisdiction of a Court and if a suit is properly filed in competent court there is no bar to prevent the Court from passing a decree for an amount in excess of its pecuniary jurisdiction. **Jurisdiction is determined by valuation in plaint and not by result of the suit.**" (Emphasis added).

A reference is also made to the decision of the learned Single Judge of this Court in the case of Dr.Vishwanath Raghuvir Sinai Edo v/s. Ashok Dattatray Dande & others, (2000(2) All M.R. page 576). The learned Single Judge has heavily relied upon the aforesaid decision of the Full Bench by holding that the determination of forum of appeal depends on the valuation of the suit disclosed at the time of filing of the suit and not on the amount decreed.

10. Turning back to the said Act of 1893, once section 4 is invoked, the procedure which is provided in section 3 of the said Act will have to be followed. Section 3 reads thus:

> "3. **Procedure when sharer undertakes to buy.-** (1) If, in any case in which the Court is requested under the last foregoing section to

direct a sale, any other shareholder applies for leave to buy at a valuation the share or shares of the party or parties asking for a sale, the Court shall order a valuation of the share or shares in such manner as it may think fit and offer to sell the same to such shareholder at the price so ascertained, and may give all necessary and proper directions in that behalf.

. (2) If two or more shareholders severally apply for leave to buy as provided in sub-section (1), the Court shall order a sale of the share or shares to the shareholder who offers to pay the highest price above the valuation made by the Court.

. (3) If no such shareholder is willing to buy such share or shares at the price so ascertained, the applicant or applicants shall be liable to pay all costs of or incident to the application or applications."

There may be various contingencies when section 4 can be invoked. One of such contingencies will be in a case where pending a suit for partition, one of the parties invokes provisions of section 4 of the said Act of 1893.

If section 4 is applicable and if the Court is inclined to order sale of the share to a party, an order will have to be passed to that effect, which will have the effect of a decree and which will be nothing but a decree passed in the said suit. In other cases, the provision of section 4 can be invoked in a proceedings commenced on the basis of a decree already passed for partition where actual physical possession is not made. Therefore, the proceedings invoking section 4 will have to be considered as the one in continuation of the original suit. Therefore, in any event, whenever an appeal is preferred for challenging the decree under section 8 of the said Act 1893, the forum of appeal will be governed by the valuation for jurisdiction made in the original suit for partition as there is no reason why the ratio of the judgment of the Full Bench will not apply to such case. If the said interpretation is not accepted, the result will be the same as indicated by the Full Bench in paragraph 21 of its decision. Therefore, in my considered view in view of section 26 of the Bombay Civil Courts Act, 1869, this Appeal is maintainable in the appropriate District Court.

11. Hence the following order is passed:

i) The Memorandum of Appeal along with its accompaniments be transferred to the District

Court at Pune for hearing and final disposal in accordance with law.

ii) Ad-interim order operating in the Appeal will continue to operate for a period of 12 weeks from today.

Judge.